A

MUNISAMY RAJAGOPAL v. SUBASHINI KARUPPIAH

HIGH COURT MALAYA, KUALA LUMPUR
LIZA CHAN SOW KENG JC
[CIVIL APPEAL NO: WA-12BNCC-1-01-2022]
10 OCTOBER 2022

B

Abstract – *The foundation of the right to restitution remedy is grounded on the law of unjust enrichment, which falls outside the domains of contract and tort. Unjust enrichment need not be pleaded so long as the cause of action could be made out from the facts pleaded by the parties.*

C

CONTRACT: *Agreement – Loan agreement – Claim by lender for recovery of sums lent as friendly loan to husband and wife – Loan disbursed into borrower's wife bank account – Whether there was friendly loan – Whether there was unjust enrichment – Whether lender entitled to judgment on amount claimed – Whether borrower's wife could be said to have entered into loan agreement with lender – Whether there was privity of contract – Whether borrower's wife accountable under law to refund money to lender by reason of restitution – Contracts Act 1950, ss. 66 & 71*

D

E

This appeal by the appellant ('plaintiff') emanated from the decision of the Sessions Court Judge ('SCJ') in dismissing the plaintiff's claim against the respondent ('first defendant'). The first defendant was the wife of the second defendant. The plaintiff claimed against the defendants for the recovery of a total sum of RM350,000 lent to the defendants as a friendly loan. It was not disputed that the loan was disbursed into the first defendant's bank account. Judgment in default ('JID') was obtained by the plaintiff against the second defendant and the trial proceeded against the first defendant. The first defendant denied the existence of any friendly loan agreement. She contended that: (i) she was informed by the second defendant that the monies paid into her account was for the payment of the purchase price of a motor vehicle belonging to her brother-in-law ('Mahesan') which was sold to the plaintiff; and (ii) the second defendant had arranged the sale of the vehicle and for the payment to be banked into her account as the second defendant was a bankrupt. The SCJ dismissed the plaintiff's claim against the first defendant on the grounds that: (i) the loan agreement was solely between the plaintiff and the second defendant; (ii) the plaintiff failed to discharge his burden of proof that the first defendant had entered into the loan agreement with the plaintiff; (iii) it was reasonable and acceptable for the second defendant to use the first defendant's name and bank account for business dealings given their husband and wife relationship so that the family could earn an income and there was no enforceable loan agreement between the plaintiff and the first defendant; and (iv) while the first defendant appeared to have benefited from the sum deposited into her bank account, based on the principle of privity of contract, only parties to the contract may sue and

F

G

H

I

be sued. The core issues in this appeal were: (i) whether there was a friendly loan of RM350,000 given by the plaintiff to the defendants; and if so, (ii) whether the plaintiff was entitled to judgment on the amount claimed against the first defendant.

Held (allowing appeal):

(1) When the JID was entered against the second defendant, all allegations of loan which gave rise to the cause of action merged in the judgment. Until set aside, the JID was incontestable proof of loan to the defendants. By virtue of the JID, the unchallenged allegations of a friendly loan as pleaded against the second defendant were assumed to have been proved. The implication of the JID (which was subsisting and remained in force) to the primary issue at the trial against the first defendant was like the proverbial elephant in the room that no one could miss but everyone overlooked in the court below, including the SCJ. Dealt with properly and taking the approach in *Kamarulzaman Omar & Ors v. Yakub Husin & Ors, Chan Kwai Foong v. Dato' Capt Mohd Najib Abdullah* and *Textainer Equipment Management Ltd v. Hub Shipping Sdn Bhd & Anor*, the defendants' testimony that the payment of RM350,000 was for the purchase of Mahesan's car went up in smoke. So too the police report made by the second defendant to say his signature on the loan letter was allegedly forged. With the JID against him, such evidence by the second defendant if assessed and weighed properly would, for good reasons, be rejected as being opportunistic and could only be motivated by sinister intent. This challenge was bound to fail. (paras 13, 17 & 20)

(2) The second defendant could not be heard to say that the RM350,000 was for the purchase of Mahesan's car and for that matter, likewise, the first defendant's defence that the second defendant told her that the RM350,000 was for the purchase of Mahesan's car imploded. One simply could not ignore that the remittance advice slips for the transfer of monies by the plaintiff to the first defendant's bank account bore the words 'friendly loan' and 'labour wages'. (para 21)

(3) Following the principles in *Yap Khay Cheong Sdn Bhd v. Susan George TM George* and *Teh Poh Wah v. Seremban Securities Sdn Bhd*, the first defendant herein having allowed the second defendant to use her account and having benefitted from it, could not be heard to say that she was not the one benefiting from that payment and need not return that money to the plaintiff. This was because it was not disputed that the money had been deposited into her bank account. Therefore, to avoid liability, the first defendant must demonstrate, at the very least, that the money was no longer with her but she failed miserably to discharge the evidential

A burden placed on her as the utilisation of the plaintiff's monies. She testified that she had given the monies to the second defendant and Mahesan but there was no evidence produced – it would have been quite simple to, at the very least, produce the bank statement. As such, the first defendant was accountable under the law to refund the money to the B plaintiff by reason of restitution under s. 71 of the Contracts Act 1950 ('Act') and under the doctrine of unjust enrichment. (para 27)

(4) The first defendant's submission of no privity of contract with the plaintiff did not get the first defendant very far as liability under s. 71 of the Act is not based on any existing contract between the parties. C Having regard to the juristic basis behind s. 71 of the Act which is premised on the equitable principles on restitution, good conscience and prevention of unjust enrichment, all the four conditions under s. 71 of the Act had been satisfied here. The loan granted by the plaintiff was given out lawfully; done ultimately for the first defendant as the monies D were credited into her bank account; the loan was not granted by the plaintiff gratuitously but in the expectation that he would be repaid; and the defendant directly benefited from the loan. (paras 31 & 32)

(5) Unjust enrichment need not be pleaded so long as the cause of action can be made out from the facts pleaded by the parties. The plaintiff had not E only suffered a loss of RM350,000 but the first defendant had been made richer by the plaintiff's loss by the same amount. This sense of injustice at the plaintiff's expense was central to the foundation of the relief of restitution based on the law of unjust enrichment. Taking into account the circumstances in which the loan was extended to the defendants in F their hour of need to assist them in their business, allowing the first defendant to retain the benefit of the monies, was not consistent with equity or good conscience. She should not be allowed to reap a windfall at the expense of the plaintiff. (paras 35 & 39)

(6) As was held by the Federal Court in *Badiaddin Mohd Mahidin & Anor* G *v. Arab Malaysian Finance Bhd*, s. 66 of the Act does not create a cause of action and it only confers a discretionary remedy into the nature of restitution to be exercised by the court within the ambit of the section and within the principles of the law of contract, so too, a right to obtain restitution under s. 71 of the Act is not a cause of action. It could not H stand on its own. It is dependent upon there being a pre-existing cause of action against the first defendant arising out of a legal or equitable right of the plaintiff for the enforcement of which the first defendant was amenable to the jurisdiction of the court. It was not necessary for the plaintiff to plead that he was seeking a s. 71 remedy. Not only that, the I statement of claim ('SOC') contained a prayer for 'such further or other relief that this Honourable Court deems fit and just'. The formulation in the plaintiff's SOC was sufficient for the exercise of equitable jurisdiction by the court. (paras 42-44)

Case(s) referred to:

Al Sharhan Sdn Bhd & Anor v. Edipro Construction & Engineering [2020] 1 LNS 1046 HC ***(refd)***

Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd [1998] 2 CLJ 75 FC ***(refd)***

Banque Financiere de la Cite, Appellants v. Parc (Battersea) Ltd [1999] 1 AC 221 ***(refd)***

Brenda Wong v. Yap Hee Tai [2018] 7 CLJ 235 HC ***(refd)***

Chan Kwai Foong v. Dato' Capt Mohd Najib Abdullah [2017] 3 CLJ 532 CA ***(refd)***

Dream Property Sdn Bhd v. Atlas Housing Sdn Bhd [2015] 2 CLJ 453 FC ***(refd)***

Gan Yook Chin & Anor v. Lee Ing Chin & Ors [2004] 4 CLJ 309 FC ***(refd)***

Ho Weng Leong v. Ng Kee Chin [1996] 1 LNS 89 HC ***(refd)***

Kamarulzaman Omar & Ors v. Yakub Husin & Ors [2014] 1 CLJ 987 FC ***(refd)***

Kepong Prospecting Ltd & Ors v. Schmidt [1967] 1 LNS 67 PC ***(refd)***

Kong Hoi Chieng v. AK Land Sdn Bhd [2021] 1 LNS 1547 CA ***(refd)***

Lim Eng Kay v. Jaafar Mohamed Said [1982] CLJ 298; [1982] CLJ (Rep) 190 FC ***(refd)***

Luggage Distributors (M) Sdn Bhd v. Tan Hor Teng & Anor [1995] 3 CLJ 520 CA ***(refd)***

Morello Sdn Bhd v. Jaques (International) Sdn Bhd [1995] 2 CLJ 23 FC ***(refd)***

Ng Hoo Kui & Anor v. Wendy Tan Lee Peng, Administrator For The Estates Of Tan Ewe Kwang, Deceased & Ors [2020] 10 CLJ 1 FC ***(refd)***

Punca Klasik Sdn Bhd v. Foh Chong & Sons Sdn Bhd & Ors [1998] 1 CLJ 601 HC ***(refd)***

Quah Swee Khoon v. Sime Darby Bhd [2001] 1 CLJ 9 CA ***(refd)***

Sempra Metals Ltd (formerly Metallgesellschaft Ltd) v. Inland Revenue Commissioners [2008] 1 AC 561 ***(refd)***

Sinar Wang Sdn Bhd v. Ng Kee Seng [2004] 3 CLJ 679 CA ***(refd)***

Siow Wong Fatt v. Susur Rotan Mining Ltd & Anor [1967] 1 LNS 161 PC ***(refd)***

Tanjung Teras Sdn Bhd v. Kerajaan Malaysia [2015] 9 CLJ 1002 CA ***(refd)***

Teh Poh Wah v. Seremban Securities Sdn Bhd [1996] 4 CLJ 16 CA ***(refd)***

Textainer Equipment Management Ltd v. Hub Shipping Sdn Bhd & Anor [2019] 1 LNS 1085 HC ***(refd)***

Yap Khay Cheong Sdn Bhd v. Susan George TM George [2018] 5 CLJ 345 CA ***(foll)***

Legislation referred to:

Contracts Act 1950, ss. 66, 71

Rules of Court 2012, O. 18 rr. 7(1), 11

For the appellant - Mavin Thillainathan & Avinash Kamalanathan; M/s Lavania & Balan Chambers

For the respondent - Ho Hon Keong; M/s Ho & Ho

Reported by Lina E

JUDGMENT

Liza Chan Sow Keng JC:

> Neither a borrower nor a lender be,
> For loan oft loses both itself and friend,
> And borrowing dulls the edge of husbandry. – Act 1 Scene 3, Hamlet by William Shakespeare.

A

Introduction

[1] This appeal by the appellant emanates from the decision of the learned Sessions Court Judge ("LSCJ") dated 31 December 2021 in dismissing with costs the appellant's claim against the respondent who was the first defendant at the Kuala Lumpur Sessions Court.

B

[2] In this judgment, the parties will be referred to as they were in the Sessions Court.

[3] On 27 July 2022, I heard the plaintiff's appeal and allowed it with costs. These are the reasons as to why.

C

Background

[4] The first defendant is the wife of the second defendant.

[5] The plaintiff claimed against the defendants for recovery of a total sum of RM350,000 lent to the defendants between August and October 2016 as
D a friendly loan ("the loan").

[6] It was not disputed that the loan was disbursed into the first defendant's bank account.

[7] Judgment in default ("JID") was obtained by the plaintiff against the
E second defendant on 29 January 2020. The trial proceeded against the first defendant.

[8] The first defendant denied the existence of any friendly loan agreement. She contended that:

F

(i) She was informed by her husband, the second defendant that the monies paid into her account was for the payment of the purchase price of a motor vehicle belonging to her brother-in-law, Mahesan s/o Kannan ("Mahesan") which was sold to the plaintiff;

(ii) The second defendant had arranged the sale of the vehicle, and payment
G was banked into her account as the second defendant is a bankrupt.

[9] The agreed issue for trial (see p. 67 appeal records) was:

> "Sekiranya bayaran RM350,000 yang telah didepositkan kepada akaun bank Defendan Pertama adalahlah menurut Perjanjian Pinjaman Persahabatan yang dikatakan tersebut adakah pihak Defendan Pertama
H mempunyai kewajipan untuk membayar balik jumlah RM350,000 tersebut selaras dengan Perjanjian Pinjaman tersebut." (If the payment of RM350,000 that was deposited into the 1st Defendant's bank account is according to the said Friendly Loan Agreement, does the 1st Defendant have the obligation to repay the amount of RM350,000 in accordance with the Loan Agreement)?

I

Decision Of The Sessions Court

[10] The LSCJ dismissed the plaintiff's claim against the first defendant with costs. In her grounds of judgment ("GOJSC"), she found that:

(i) the friendly loan agreement was solely between the plaintiff and the second defendant;

(ii) the plaintiff failed to discharge his burden to prove that the first defendant has entered into the loan agreement with the plaintiff (paras. 27 and 28 GOJSC);

(iii) that it was reasonable and acceptable for the second defendant to use the first defendant's name and bank account for business dealings given their husband-and-wife relationship so that the family can earn an income; and there was no enforceable loan agreement between the plaintiff and the first defendant (paras. 30 to 33 GOJSC); and

(iv) the first defendant appeared to have benefited when the sum of RM350,000 was deposited into her bank account; however, based on the principle of privity of contract, only parties to the contract may sue and be sued, citing *Punca Klasik Sdn Bhd v. Foh Chong & Sons Sdn Bhd & Ors* [1998] 1 CLJ 601 (paras. 39 and 40 GOJSC).

Law On Appellate Intervention

[11] I can be forgiven for reproducing *Al Sharhan Sdn Bhd & Anor v. Edipro Construction & Engineering* [2020] 1 LNS 1046; [2021] 10 MLJ 585, where I have discussed the fundamental principles pivotal to be borne in mind by an appellate court in hearing an appeal from a judgment of the trial court:

> [7] In hearing this appeal, this Court as an appellate court is reminded that it should be *slow to interfere with the findings of fact of a trial judge.* Reference is made to *China Airlines Ltd v. Maltra Air Corp Sdn Bhd (formerly known as Maltran Air Services Corp Sdn Bhd) and another appeal* [1996] 3 CLJ 163 where the Federal Court at page 175 said:
>
> > It is a settled principle of law that in an appeal, where facts have to be reviewed, it is undesirable that the findings of the court below should be disturbed by a court of appeal unless it appears that those findings are clearly wrong, and more especially that it is undesirable to do so where the conclusion reached must to a large extent depend on the credibility of the witnesses and the impression formed by a court which has seen them and can judge their honesty and accuracy.
>
> [8] In *Lee Chee Keong v. Fadason Holdings Sdn Bhd* [2017] MLJ 728, the Court of Appeal citing the judgment of Nallini Pathmanathan JCA (now FCJ) in *MMC Oil & Gas Engineering Sdn Bhd v. Tan Boon Kwee & Sons Sdn Bhd* [2016] 2 MLJ 428 held that appellate interference is only warranted where no reasonable Judge could have reached the same conclusion of the trial judge:

A

[15] This is a point of some importance because it underscores the rationale that the appellate court is not at liberty to reverse or interfere in the finding of a trial judge even if the appellate court is clearly of the view that it would not have reached the conclusion the trial judge did on the evidence on record before it. It requires something more. The requisite or correct standard to be applied is

B

that no reasonable judge, on the evidence on record, could have reached the conclusion of the trial judge. In other words, so long as the findings of the trial judge are plausible on the evidence on record, there is no room for interference merely on the grounds that the appellate court forms a different opinion on the same evidence.

C

[9] The Federal Court in *Ming Holdings (M) Sdn Bhd v. Syed Azahari Noh Shahabudin & Anor* [2010] 6 CLJ 857 at pages 873 to 875 had this to say:

[41] Before we leave this subject and move on to the next two questions, *we feel a need to remind that a trial judge has the advantage over an appellate court in hearing the witness and observing his demeanour. Thus, unless the trial judge is plainly wrong in his finding, the appellate court should not reverse a finding of fact by the trial judge.* This "plainly wrong" test has been long established and can be observed in the Judicial Committee of the Privy Council pronouncement in *Chow Yee Wah & Anor v. Choo Ah Pat* [1978] 1 LNS 32 where Lord Fraser said:

D

E

> In the face of that finding by the trial judge on the question of fact the Federal Court were *only entitled to displace his conclusion if they were satisfied that his view was plainly wrong and that any advantage which he enjoyed by having seen and heard the witness was not sufficient to explain his conclusion,* as the authorities already quoted show.

F

[42] Before stating this, Lord Fraser cited two cases in support which we find appropriate to repeat as a reminder to all appellate courts of their role in dealing with a finding of fact by a trial judge.

G

[43] The first is Lord Tankerton in *Watt or Thomas v. Thomas* [1947] AC 487:

(1) Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself as a judge, an appellate court which is disposed to come to a different conclusion on printed evidence, should not do so

H

unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion.

(2) The appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any

I

satisfactory conclusion on the printed evidence.

(3) The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen or heard the witnesses, and the matter will then become at large for the appellate court.

[44] The second is from Viscount Sankey LC in *Streatham Manor Nursing Home* [1935] AC 36, 36 who said:

> … *it is perfectly true that an appeal is by way of rehearing, but it must not be forgotten that the Court of Appeal does not rehear the witnesses.* It only reads the evidence and rehears the counsel. Neither is it reseeing the court. There are different meanings to be attached to the word 'rehearing'. For example, the rehearing at the Quarter Sessions is a perfect rehearing because, although it may be the defendant who is appearing, the complainant starts again and has to make out his case and call his witnesses. The matter is rather different in the case of an appeal to the Court of Appeal. There the onus is upon the appellant to satisfy the court that his appeal should be allowed. There have been a very large number of cases in which the law on this subject has been canvassed and laid down. There is a difference between the manner in which the Court of Appeal deals with a judgment after trial before a judge alone, the Court of Appeal will not set aside the judgment unless the appellant satisfies the court that the judge was wrong and that his decision ought to have been the other way. Where there has been a conflict of evidence the Court of Appeal will have special regard to the fact that the trial judge saw the witnesses: see *Clarke v. Edinburgh Tramways Co*: per Lord Shaw, 1919 SC (HC) 35, 36, where he says:
>
> > When a judge hears and sees witnesses and makes a conclusion or inference with regard to what on balance is the weight of their evidence, that judgment is entitled to great respect, and that quite irrespective of whether the judge makes any observation with regard to creditability or not. I can of course quite understand a Court of Appeal that says that it will not interfere in a case in which the judge has announced as part of his judgment that he believes one set of witnesses, having seen them and heard them, and does not believe another. But that is not the ordinary case of a cause in a court of justice. In the courts of justice in the ordinary case things are much more evenly divided; witness without any conscious bias towards a conclusion may have in their demeanour, in their manner, in their hesitation, in their nuance, of their expressions,

A in even the turns of the eyelid, left an impression upon the man who saw and heard them which can never be reproduced in the printed pages. What in such circumstances, thus psychologically put, is the duty of the appellate court? In my opinion, the duty of the appellate court in those circumstances is for B each judge of it to put himself, as I now do in this case, the question: Am I who sit here without those advantages, sometimes broad and sometimes subtle, which are the privilege of the judge who heard and tried the case in a position, not having those privileges, to come to a clear conclusion that the C judge who had them was plainly wrong? If I cannot be satisfied in my own mind that the judge with those privileges was plainly wrong, then it appears to me to be my duty to defer to his judgment.

[45] The above principle is reiterated by this Court in *Gan Yook Chin* D *& Anor v. Lee Ing Chin & Ors* [2004] 4 CLJ 309.

[10] The Court of Appeal has also in the case of *Sivalingam a/l Periasamy v. Periasamy & Anor* [1995] 3 MLJ 395 clearly stated that:

It is trite law that this court will not readily interfere with the findings of fact arrived at by the court of first instance to which E the law entrusts the primary task of evaluation of the evidence. But we are under a duty to intervene in a case where, as here, the trial court has so fundamentally misdirected itself, that one may safely say that no reasonable court which had properly directed itself and asked the correct questions would have arrived at the same conclusion. F

[11] It is also trite that apart from a wrong application of the law, insufficient judicial evaluation of the evidence also justifies appellate intervention – *Lee Ing Chin & Ors v. Gan Yook Chin & Anor* [2003] 2 CLJ 19 where the Court of Appeal speaking through Gopal Sri Ram JCA (as he then was), stated the need to assess the evidence and to weigh them G and for good reasons accept or reject them accordingly, as follows:

Suffice to say that we re-affirm the proposition that an appellate court will not, generally speaking, intervene unless the trial court is shown to be plainly wrong in arriving at its decision. But appellate interference will take place in cases where there has been H no or insufficient judicial appreciation of the evidence. It is, we think appropriate that we say what judicial appreciation of evidence involves. *A judge who is required to adjudicate upon a dispute must arrive at his decision on an issue of fact by assessing, weighing and, for good reasons, either accepting or rejecting the whole or any part of the evidence placed before him.* He must, when deciding whether to accept or to I reject the evidence of a witness, test it against relevant criteria. Thus, he must take into account the presence or absence of any

> motive that a witness may have in giving his evidence. If there are contemporary documents, then he must test the oral evidence of a witness against these. He must also test the evidence of a particular witness against the probabilities of the case. A trier of fact who makes findings based purely upon the demeanour of a witness without undertaking a critical analysis of that witness' evidence runs the risk of having his findings corrected on appeal. It does not matter whether the issue for decision is one that arises in a civil or criminal case: the approach to judicial appreciation of evidence is the same.

[12] The above statement of law on the need to assess, weigh and, for good reasons, either accepting or rejecting the whole or any part of the evidence placed before the Court was affirmed by the Federal Court in *Gan Yook Chin & Anor v. Lee Ing Chin & Ors* (*supra*) where the Federal Court said:

> 14 In our view, the Court of Appeal in citing these cases had clearly borne in mind the central feature of appellate intervention, *ie*, to determine whether or not the trial court had arrived at its decision or finding correctly on the basis of the relevant law and/or the established evidence. In so doing, the Court of Appeal was perfectly entitled to examine the process of evaluation of the evidence by the trial court. Clearly, the phrase 'insufficient judicial appreciation of evidence' merely related to such a process. This is reflected in the Court of Appeal's restatement that a judge who was required to adjudicate upon a dispute must arrive at his decision on an issue of fact by assessing, weighing and, for good reasons, either accepting or rejecting the whole or any part of the evidence placed before him. The Court of Appeal further reiterated the principle central to appellate intervention, *ie*, that a decision arrived at by a trial court without judicial appreciation of the evidence might be set aside on appeal. This is consistent with the established plainly wrong test. (emphasis added)

Decision Of This Court

[12] In my respectful view, the core issues in this appeal are: (i) whether there was a friendly loan of RM350,000 given by the plaintiff to the defendants; and if so, (ii) whether the plaintiff is entitled to judgment on the amount claimed against the first defendant.

Whether There Was A Friendly Loan Of RM350,000 Given By The Plaintiff To The Defendants

[13] In this court's view, when judgment in default ("JID") was entered against the second defendant on 29 January 2020, all allegations of loan which gave rise to the cause of action merged in the judgment. Until set aside, the default judgment was the incontestable proof of loan to the defendants.

[14] In *Kamarulzaman Omar & Ors v. Yakub Husin & Ors* [2014] 1 CLJ 987; [2014] 2 MLJ 768, a land fraud case, it was pleaded that the first to fourth respondents had acquired the title to the property in question through fraud and misrepresentation. The said property was then transferred to the fifth and sixth respondents who claimed that they had acquired an indefeasible title as they were *bona fide* purchasers. The first to fourth defendants did not defend the claim and a default judgment was entered against these defendants. The Federal Court, held as follows on the effect of the default judgment:

> [9] By that, the trial court clearly held that fraud had been made out against the first to fourth respondents and so needed not to be proved. *Indeed, when the first to fourth respondents failed to defend the claim, it should be assumed that the appellants had made out fraud against the first to fourth respondents. It would be against all good sense and logic, quixotic in fact, to hold that an allegation, although unanswered, must yet be proved.*
>
> [10] When an allegation is unanswered, it must be assumed as proved, even if the party only swears to the best of his knowledge and belief (see *Williamson v. Ah On* – BC2700043, where the High Court of Australia cited *Stokes v. Grissell* 14 CB, at pp. 689-690, where Williams J, said of chambers applications 'Where the party swears to the best of his knowledge and belief as to a matter upon which from its nature he cannot swear positively if the affidavit is unanswered by the other side, I assume the fact to be proved').
>
> [11] *Given that alleged fraud passed wholly unanswered by the first to fourth respondents, the trial court at 43 of the AR was wholly warranted to hold that with default judgment against the first to fourth respondents, fraud by them needed not to be proved by the appellants.* But later, the trial court expressed an inconsistent opinion. At 52 of the AR, the trial court held, so as to distinguish Tan Ying Hong, that the default judgment was not a specific finding that the first to fourth respondents committed fraud in the distribution of the estate of the deceased to themselves. With respect, the judgment was the judicial decree that fraud by the first to fourth respondents had been made out. The cause of action of the appellants against the first to fourth respondents was fraud in the distribution of the estate of the deceased. *When judgment was entered against the first to fourth respondents, all allegations of fraud which gave rise to the cause of action merged in the judgment* (see *Distillers Co Bio-Chemicals (Australia) Pty Lyd v. Ajax Insurance Co Ltd* [1974] 2 ALR 321, where the High Court of Australia per Menzies J said '… the plaintiff's cause of action against the insured would merge in the judgment once it was obtained …') and the rights of the appellants to relief became rights to enforce the judgment (see *Liaw Watt Lee & Ors v. Baiduri Bank Bhd and another appeal* [2010] 5 MLJ 551, where the Brunei Court of Appeal per Power PCA expressed 'that generally when judgment is given in an action, the original causes of action merge in the judgment; the plaintiff's rights to relief as expressed in the statement of claim are extinguished and become rights to enforce the judgment instead'). Until set aside, the default judgment was the incontestable proof of fraud by the first to fourth respondents.
>
> (emphasis added)

[15] Similarly, in *Chan Kwai Foong v. Dato' Capt Mohd Najib Abdullah* [2017] 3 CLJ 532; [2017] 3 MLJ 219, Harmindar Singh Dhaliwal JCA (as His Lordship then was) held:

> [40] As was indicated at the outset, the claim against Natarjaya was based on fraud as was the claim against the fourth defendant. Natarjaya and its directors (the second and third defendants) did not file any appearance and failed to turn up in court. The learned JC was then entitled to rule, as he did, that based on the decision in *Kamarulzaman*, *the finding of fraud was taken to have been proved against the first, second and third defendants and this finding would also be binding on the other defendants in the action.*
>
> (emphasis added)

[16] In *Textainer Equipment Management Ltd v. Hub Shipping Sdn Bhd & Anor* [2019] 1 LNS 1085; [2018] 10 MLJ 596, the plaintiff leased shipping containers to the first defendant. These containers were stored at the second defendant's premises. The plaintiff obtained a declaratory judgment in default against the first defendant that the 209 containers were leased to the first defendant by the plaintiff and that the plaintiff was in law entitled to, or to the return of the 209 shipping containers. The plaintiff sought for a return of the containers, however the second defendant asserted a *lien* over the containers. In finding for the plaintiff, Gunalan Muniandy J (as His Lordship then was) held as follows:

> [8] The question that would naturally arise in the context of the present dispute and scenario is *the effect on D2 of the JID that P has obtained against D1. It is indisputable that by virtue of the Federal Court judgment P would in law no longer have to prove the contractual relationship with D1, which would be assumed to have been proved as a result of the said JID. As P's allegations of fact as set out in the statement of claim against D1 have been left unanswered, the allegations are deemed to have been proved and assumed to be true and correct.* Lastly, until the JID is set aside, it is considered as incontestable proof of the allegations.
>
> …
>
> [34] Beginning with the first and foremost issue, *it is crucial to note that plaintiff ('P') has obtained a judgment in default ('JID') against the first defendant ('D1') which has not been set aside and is binding and enforceable. Therefore, the issues pleaded by the P against D1 in the writ and statement of claim have been settled and can no longer be disputed as D1 has admitted the same. In the context of this trial, the contractual relationship between P and D1 in respect of the subject-matter of this claim, ie, the 209 containers in the possession of D2, cannot as such be disputed. It follows that by virtue of the JID the unchallenged allegations as pleaded against D1 as to the ownership of the 209 containers by P are considered to have been proved.* The principle in the Federal Court case of *Kamarulzaman Omar v. Yakub bin Husin* is binding on this court.
>
> (emphasis added)

[17] Following *Kamarulzaman* (*supra*), as well as *Chan Kwai Foong* (*supra*), by virtue of the JID, the unchallenged allegations of a friendly loan as pleaded against the second defendant are assumed to have been proved.

[18] The implications of the JID (which is subsisting and remains in force) to the primary issue at the trial against the first defendant is like the proverbial elephant in the room that no one could miss, but everyone overlooked in the court below, including the LSCJ. Herein, in my respectful view, lies the nub of the problem.

[19] This is a question of law which this court is entitled to look at. Indeed, parties were invited to submit on this.

[20] Dealt with properly, and taking the approach in *Kamarulzaman* (*supra*), *Chan Kwai Foong* (*supra*) and *Textainer Equipment Management Ltd* (*supra*), both the second defendant and first defendant's testimony that the payment of RM350,000 is for purchase of Mahesan's car goes up in smoke. So too, the police report at p. 38, Jilid 2/2 appeal records made on 14 January 2020 by the second defendant to say his signature on the loan letter was allegedly forged, or that the money is for purchase of Mahesan's car which ought to be disregarded. With JID against him, such evidence by the second defendant if assessed and weighed properly would, for good reasons, be rejected as being opportunistic, and can only be motivated by sinister intent. I considered that this challenge was bound to fail.

[21] Over and above the legal implications of *Kamarulzaman* on the JID, which means the second defendant cannot be heard to say that the RM350,000 is for the purchase of Mahesan's car, and for that matter, likewise, the first defendant's defence that her husband, the second defendant told her that the RM350,000 is for the purchase of Mahesan's car imploded, one simply cannot ignore that the remittance advice slips for transfer of monies by the plaintiff into the first defendant's bank account bore the words 'friendly loan' and 'labour wages'.

[22] In this case, the plaintiff had adduced contemporaneous documents to show and support his case on the transfer of the sum of RM350,000 to the first defendant through the remittance slips as follows:

	Appeal record	amount	date	particulars (in remittance slip)
i.	Enc 5 Pg 28	RM50,000	25.8.16	friendly loan
ii.	Enc 5 Pg 29	RM100,000	26.8.16	friendly loan
iii.	Enc 5 Pg 30	RM100,000	8.9.16	labour wages
iv.	Enc 5 Pg 31	RM100,000	6.10.16	online transfer

[23] It bears repetition that it is undisputed the whole amount of RM350,000 was deposited into the first defendant's account. There are absolutely no merits to the first defendant's defence. She acknowledged in her evidence in chief at Q&A 9 and during cross-examination that she had no personal knowledge concerning the dealings involving the car. Added to that, the evidence when properly analysed will lead to a finding that the fate of the first defendant's defence was sealed by her failure to call Mahesan to testify although Mahesan was in her witness list. His not testifying is significant; as here is a case where the first defendant posited that she was told by her husband, the second defendant that the monies banked into her account was for the purchase of Mahesan's car.

[24] It is well established as a general rule that the 'burden of proof' in a civil case is on the plaintiff but the burden will shift when the plaintiff has adduced sufficient evidence of probative value which requires the defendant to rebut the plaintiff's evidence. It therefore behoves the first defendant to call Mahesan to testify to rebut the allegations made against her and her husband by the plaintiff. This failure must, on the facts of this case, be thrown into the balance when evaluating the evidence of all the other witnesses. The LSCJ did not do so. She ought to have. I am therefore in accord with the plaintiff's postulation that this failure fatally flaws the LSCJ's evaluation of the evidence. Not forgetting of course, and at risk of repetition, that both defendants cannot be heard to say the monies are for the purchase of Mahesan's car when there is the JID pertaining to a friendly loan staring at both defendants in the face. Implicitly the contention falls. Until set aside, the JID was the incontestable proof of the friendly loan to the defendants.

Whether The Plaintiff Is Entitled To Judgment On The Amount Claimed Against The First Defendant

[25] That the RM350,000 is a friendly loan, is as such settled by the JID. The only issue which then remains is, whether the first defendant ought to pay the monies back.

[26] The plaintiff's counsel had drawn the attention of this court to the case of *Yap Khay Cheong Sdn Bhd v. Susan George TM George* [2018] 5 CLJ 345; [2019] 1 MLJ 410 where the plaintiff sought from the defendant a return of monies (which were deposited into the defendant's account) on the grounds that the defendant had derived a personal benefit from the same. This was notwithstanding that the principal dealings in the transaction were conducted by one Tharvinder whom the defendant had given full authority to use and manage her personal bank account. The Court of Appeal observed as follows:

> [22] … The sum of RM247,000 was deposited into the bank account of the defendant. The defendant as an account holder, has sole legal control and custody of her own bank account. It is accepted that no person can have any access to another person's account unless consented to. In this

A case the defendant had allowed Tharvinder free access to her account and she should be held responsible for the outcome of her action. *Since she had allowed Tharvinder to meddle with her account, in our view she cannot absolve her responsibility by just feigning ignorance about what went on in her account.* We all know that under the normal order of the day, her bank would have contacted her about an unusually large transaction or an out of the
B ordinary transaction such as this. She would have been alerted and would have been aware of the transaction with the plaintiff. *While saying that the monies was drawn out by Tharvinder, the defendant had not shown any shred of documentary proof to support her version* …

…

C [24] In relation to authorising the use of account, the decision of this court in *Teh Poh Wah v. Seremban Securities Sdn Bhd* [1996] 1 MLJ 701 would provide a useful guidance. In that case, the wife who had given a blanket authority for her husband to transact shares in her trading account was held to be responsible for the loss in that account. Likewise, in the present case, since the defendant had given Tharvinder the authority to access her
D account without limitation, she cannot now say she was not the one benefitting from that payment and need not return that money to the plaintiff. … (emphasis added)

[27] Following the principles in *Yap Khay Cheong* and *Teh Poh Wah*, just as in these two Court of Appeal cases, the first defendant here, having
E allowed her husband, the second defendant to use her account and having benefitted from it, the first defendant cannot be heard to say she was not the one benefitting from that payment and need not return that money to the plaintiff. This is because it was not disputed that the money had been deposited into her bank account. Therefore, to avoid liability, the first
F defendant must demonstrate at the very least that the money was no longer with her but she failed miserably to discharge the evidential burden placed on her as to the utilisation of the plaintiff's monies. She testified that she had given the monies to the second defendant and Mahesan but there was no evidence produced – it would have been quite simple to at the very least,
G produce the bank statements. As such, I am of the considered opinion that she is accountable under the law to refund the money to the plaintiff by reason of restitution under s. 71 Contracts Act 1950 ("the Act") and under the doctrine of unjust enrichment.

Restitution Under S. 71 Of The Act

H

[28] Section 71 of the Act reads:

Obligation of person enjoying benefit of non-gratuitous act

71. Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other
I persons enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered.

Illustrations

(a) A, a tradesman, leaves goods at B's house by mistake B treats the goods as his own. He is bound to pay A for them.

(b) A saves B's property from fire. A is not entitled to compensation from B, if the circumstances show that he intended to act gratuitously.

[29] In the oft quoted case of *Siow Wong Fatt v. Susur Rotan Mining Ltd & Anor* [1967] 1 LNS 161; [1967] 2 MLJ 118, the Privy Council held that to succeed in a claim under s. 71 of the Act, the doing of the act or the delivery of the thing must meet the following four conditions:

(i) must be lawful;

(ii) must be done for another person;

(iii) must not be intended to be done gratuitously; and

(iv) must be such that the other person enjoys the benefit of the act or the delivery.

[30] Lim Yee Lan JCA in delivering the judgment of the Court of Appeal in *Tanjung Teras Sdn Bhd v. Kerajaan Malaysia* [2015] 9 CLJ 1002; [2015] MLJU 2161 explained the basis of a claim behind s. 71 of the Act:

Juristic Basis Behind S. 71

[31] Section 71 is the statutory embodiment of the common law principle of quantum meruit, which provides for a just compensation as the measure of the work done as opposed to contractual damages (see: *Siow Wong Fatt, Craven-Ellis v. Cannons Ltd* [1936] 2 KB 403, *Delpuri-Harl Corp JV Sdn Bhd v. Perbadanan Kemajuan Negeri Selangor* [2014] 1 LNS 1075; *Spatial Ventures Sdn Bhd v. Twintech Holdings Sdn Bhd* [2013] 1 LNS 729; [2014] 8 MLJ 14).

[32] *Liability under s. 71 is not based on any existing contract between the parties. Rather it is based on the equitable principle of conscionable conduct and restitution to prevent unjust enrichment by one party at the expense of another party* (see: *Ramkrishna Shankarrao v. Rangoobai and anr* AIR [1959] Bom 519; (1958) 60 BOMLR 459, *Abu Mohammed v. Mohammed Kunju Lebba* (1995) DMC 316 and *Pallonjee Eduljee and Sons v. the Lonavala City Municipality* AIR [1937] Bom 417; (1937) 39 BOMLR 835).

[33] In *Craven-Ellis v. Cannons Ltd,* it was held that:

The obligation to pay reasonable remuneration for the work done when there is no binding contract between the parties is imposed by a rule of law and not by an inference of fact from the acceptance of service.

A [34] In *Ramkrishna Shankarrao v. Rangoobai*, it was held as follows:

> From a bare reading of the section, it is clear that even if there is no contract for the performance of certain work and if the Plaintiff has done that work, without intending to do that work gratuitously, and the Defendant has enjoyed the benefits thereof, then the Defendant is bound to compensate the Plaintiff in respect of such work. The equitable principle underlying Section 70 of the Contract Act is that there should be no undue enrichment of one party at the cost of another. It is based on the principle of restitution which prevents unjust enrichment by one party. The learned Counsel for the Appellant invited my attention to some reported decisions on this point.
>
> In: [1968] 3 SCR 214, *Mulachand v. State of MP*, it was held that the contract in that case was not a valid one. However, the relief was granted by invoking Section 70 of the Indian Contract Act. It was pointed out that under Section 70 of the Contract Act the juristic basis of the principle under this section is not founded on any contract or tort but it is based on quasi-contract.
>
> In: [1970] 3 SCR 415, P Dhunji Shaw Poona Municipality the plaintiff was supplying goods to the Municipality for which there was no contract but it was held that under Section 70 of Contract Act when a person lawfully delivers to another and not intending to do so gratuitously is entitled to return of the goods or the payment of the value of the goods. Similarly, in: In: [1970] 3 SCR 415, *P Dhunji Shaw v. Poona Municipality* the plaintiff was supplying goods to the Municipality for which there was no contract but it was held that under Section 70 of Contract Act when a person lawfully delivers to another and not intending to do so gratuitously is entitled to return of the goods or the payment of the value of the goods. Similarly, in: [1978] 3 SCR 571, *Md Ishaq v. Iqbal & Md Ali & Company* it was also a case of Plaintiff's supplying some goods to the Defendants and there was no contract. The court spelt out an implied contract by conduct of the parties. That means there was supply of goods by the Plaintiff and its acceptance by the Defendants. Even in the present case, the Plaintiff has done some additional work and the Defendant has accepted and enjoyed the benefits of the same.
>
> Similarly, in: [1980] 3 SCR 893 *Union of India v. JK Gas Plant* the Supreme Court applied the principle underlying Section 70 of the Contract Act and granted the relief even though there was no valid contract. It was held that since the Defendant has enjoyed the benefit of the work done by the Plaintiff, he is bound to pay the full value of the goods.

[35] In *Abu Mohammed v. Mohammed Kunju Lebba* the court held as follows:

> The Section indicates that there is no distinction between the grant of a benefit to another on request and a grant without request. In both cases the person who enjoyed the benefit has liability to

recompense the grantor of the benefit and the only exception is that when the grant was intended as a gratis, the recipient has no legal liability. It is now well settled that Section 70 is much wider in scope than the principles adumbrated in common law (*vide Gajapathy Krishna Chandra Sreenivasa*, AIR [1915] Mad 95).

[36] In *Pallonjee Eduljee and Sons v. the Lonavala City Municipality* the Bombay High Court held, *inter alia*, as follows:

... The important point to notice is that in a case falling under s. 70 the person doing something for another or delivering something to another cannot sue for the specific performance of the contract, nor ask for damages for the breach of the contract, for the simple reason that there is no contract between him and the other person for whom he does something or to whom he delivers something. So, where a claim for compensation is made by one person against another under s. 70 it is not on the basis of any subsisting contract between the parties but on a different kind of obligation. The juristic basis of the obligation in such a case is not founded upon any contract or tort but upon a third category of law, namely, quasi contract or restitution. In *Fibrosa v. Fairbairn* [1943] AC 32 Lord Wright has stated the legal position as follows:

> ... any civilised system of law is bound to provide remedies for cases of that has been called unjust enrichment or unjust benefit, that is, to prevent a man from retaining the money of, or some benefit derived from, another which it is against conscience that he should keep. Such remedies in English Law are generally different from remedies in contract or in tort, and are now recognised to fall within a third category of the common law which has been called quasi-contract or restitution.
>
> 6. In *Nelson v. Larholt* [1948] 1 KB 330 Lord Denning has observed as follows:
>
> It is no longer appropriate to draw a distinction between law and equity. Principles have now to be stated in the light of their combined effect. Nor is it necessary to canvass the niceties of the old forms of action. Remedies now depend on the substance of the right, not on whether they can be fitted into a particular framework. The right here is not peculiar to equity or contract or tort, but falls naturally within the important category of cases where the court orders restitution if the justice of the case so requires.
>
> 7. Applying the principle to the present case, it is manifest that the appellant would have been entitled to compensation under s. 70 of the Indian Contract Act if he had adduced evidence in support of his claim.

A [37] Section 70 of the Indian Contract Act referred to in the three Indian cases is in *pari materia* with s. 71 of our Contracts Act.

[38] *In the light of the decided authorities cited above on the jurisdic basis behind s. 71 of our Contracts Act, it is thus clear that the learned SFC's submission that there is no obligation on the part of the plaintiff to pay the defendant for the super*
B *structure work done because there was no privity of contract between the parties does not hold any water.*

...

[47] *Having regard to the juristic basis behind s. 71 which is premised on the equitable principle of restitution, good conscience and prevention of unjustment*
C *enrichment, we hold as a matter of fact that at the time the super structure work was done by the defendant, it was done for the plaintiff as the ultimate owner of the project and the plaintiff was the direct beneficiary of the project. The defendant had intended to be paid for carrying the works. The fact that the defendant would receive payment from JP and not the plaintiff did not alter the fact that the defendant never intended the work to be done gratuitously. The second condition ought to have been found in*
D *favour of the defendant.*

[48] We now come to the fourth condition. In this regard, we are again of the view that the learned *High Court Judge erred in holding that as the whole project was not completed and the plaintiff had to appoint a new contractor to complete the project, the plaintiff had not benefited from the defendant's work.*

E [49] It must be borne in mind that the *defendant was only appointed as a sub-contractor to construct the super structure work while the construction of the entire project was the responsibility of JP.* (emphasis added)

[31] Here, the first defendant's submission of no privity of contract with the plaintiff does not get the first defendant very far as liability under s. 71
F is not based on any existing contract between the parties – *Tanjung Teras* (*supra*) at [32]. In *Tanjung Teras* (*supra*), the claim in *quantum meruit* by the contractor engaged by the developer succeeded against the project owner who is the ultimate beneficiary of the non-gratuitous work done by the contractor. The contractor was not paid by the developer who was terminated by the
G project owner; as such, the developer was not paid. Not only that, in *Dream Property Sdn Bhd v. Atlas Housing Sdn Bhd* [2015] 2 MLJ 441; [2015] 2 CLJ 453, our Federal Court has recognised an independent cause of action in unjust enrichment. In that case, the Federal Court observed that the foundation of the right to restitution remedy as it is understood today is that
H it is founded on the law of unjust enrichment, which falls outside the domains of contract and tort. Unjust enrichment as a separate cause of action is discussed in a later part of this judgment.

[32] In my view, having regard to the juristic basis behind s. 71 of the Act which is premised on the equitable principles of restitution, good conscience
I and prevention of unjust enrichment, I hold the respectful view that all the four conditions under s. 71 of the Act have been satisfied here – the loan

granted by the plaintiff was given out lawfully, done ultimately for the first defendant as the monies were credited into her bank account; the loan was not granted by the plaintiff gratuitously but in the expectation that he will be repaid; and the first defendant directly benefitted from the loan.

[33] In fact the LSCJ acknowledged that the first defendant did benefit from the loan but nevertheless failed to judicially appreciate and therefore erroneously applied the wrong principle of law in paras. 39 and 40 of the GOJSC, to wit there is no privity of contract, to deny the plaintiff's claim when liability under s. 71 of the Act is not based on any existing contract between the parties – *Tanjung Teras* (*supra*) at [32]. Plainly, the obligation to provide the remedy of restitution does not rest on any contractual basis. As such, the case of *Punca Klasik Sdn Bhd v. Foh Chong & Sons Sdn Bhd & Ors* [1998] 1 CLJ 601 referred by the LSCJ to exonerate the first defendant of liability, so too the cases of *Kepong Prospecting Ltd & Ors v. Schmidt* [1967] 1 LNS 67; [1968] 1 MLJ 170 and *Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd* [1998] 2 CLJ 75; [1998] 1 MLJ 393 cited by the first defendant's counsel in my utmost respectful view, do not apply. In my opinion, the finding by the LSCJ that the first defendant appeared to have benefited when the sum of RM350,000 was deposited into her bank account is fatal to any argument by the first defendant resting on no liability under s. 71 of the Act to make restitution.

[34] This approach to make the first defendant liable for restitution under s. 71 of the Act is fortified by the case of *Brenda Wong v. Yap Hee Tai* [2018] 7 CLJ 235; [2018] 9 MLJ 63 brought to the court's attention by the plaintiff's counsel where the facts are quite similar. In *Brenda Wong*, the plaintiff made payment of certain monies directly into the second defendant's bank account on the instruction of her husband, the first defendant, who was a bankrupt at the material time. The remittance of the monies was undisputed. The trial proceeded solely between the plaintiff and the second defendant. The wife's principal defence was that there was no evidence that could attribute liability against her as she was not involved in the dealings between the plaintiff and her husband. The wife testified that her bank account was at all material times managed by her husband. The trial judge dismissed the plaintiff's claim on the ground that the wife was not involved in the transaction and therefore, there was no agreement between her and the plaintiff that could be enforced by the plaintiff. On appeal however, Mohd Nazlan Ghazali J (now JCA) reversed the decision of the Sessions Court, ordered the wife to return the sum of RM645,000 to the plaintiff and held with typical acuity as follows:

> No evidence to attach liability on the respondent?
>
> [34] This is the crux of the contention between the parties. This is also the heart of the appeal. *The principal argument of the respondent* as similarly found by the sessions court is that on the evidence, *she was not involved in the transaction.*

A [35] It is worth reiterating that the *main assertions by the respondent* are that *firstly she had absolutely no dealings with the appellant* which is not denied by the appellant, other than her admission that the sum equivalent to the commission payment of RM645,000 had been credited into her account. And *secondly however, the respondent maintained she had nothing to do with the same, as the money was handled by her husband, the first defendant, who, according* B *to her testimony, managed her bank account.*

…

[39] *Secondly, I do not consider it correct that the respondent is entirely a stranger in the transaction on the commission payment. Because it is not disputed that the money in question had been deposited in the bank account of the respondent as* C *requested by the first defendant, and the case of the appellant is for the respondent to return the money, in order to avoid liability, the respondent must demonstrate that that at least the money is no longer placed in her account.*

[40] This *evidential burden is firmly on the respondent but has not been discharged by her.* And neither is there evidence that the money had been paid to D Bayerex, which was claimed to have appointed the first defendant and the respondent as agents for the purported purpose of assisting the plaintiff's company getting a loan from a bank in Canada, to collect the aforesaid sum for Bayerex.

…

E [42] Nevertheless, *in my assessment, the respondent simply cannot deny knowledge or claim ignorance of the transaction by refusing to offer the evidence to show that the money had been paid out of her account to the intended recipient. Or at least to show the money is no longer in the account. In response, the respondent merely said she did not know anything about the transaction and her bank account* F *was managed by the first defendant. This in my view is plainly insufficient.*

[43] First, there is some doubt as to whether it is true that her husband was operating her bank account. As highlighted by the appellant, there was some contradiction in her testimony during cross-examination. *One would expect an account holder to manage his or her own account,* in line with the standard bank regulation and the usual terms and conditions on use of G account.

[44] Secondly, *this contention of the respondent given under oath, is not only bold, but also bald. It is entirely unsubstantiated. Despite the evidence that the money did find its way into her own account, she did not, crucially in my view, offer any document to at least corroborate her version that the sum of RM645,000 had been* H *utilised by the first defendant. The version that the sum remained in her account cannot be dismissed. She could have easily dispelled that by producing her own bank statement. She conveniently chose not to.*

…

[47] Thus, *otherwise, if the respondent's contention is accepted, then a defendant* I *could easily and with impunity orchestrate a situation to extricate himself from liability by simply denying any knowledge or involvement in the transaction in dispute without offering any supporting evidence to discharge the evidential burden.*

That would not be countenanced by the law and is inconsistent with the ends of justice. That situation, like presently, is precisely the reason for the necessity for a party to discharge an evidential burden.

…

[52] In *addition, and quite separate from the grounds discussed in the preceding paragraphs, the one other basis that operates to demolish the defence of the respondent is that the stance of the respondent would translate into what would otherwise be unjust enrichment on the part of the respondent. This is because the sum of RM645,000 is not in any event the property of either the first defendant and what more the respondent* (who denied having anything to do with the money) given that it was clear that the underlying transaction on the opening of the account or approval of the loan for I-Cloud plainly did not happen, if not an outright deception in the first place.

[53] As discussed earlier, it is incontrovertible that the sum was credited from the personal account of the appellant. Since there was no loan transaction with HSBC and also as the agreement was for the first defendant to make the refund should the loan not materialise, it is beyond dispute that the money must be returned to the appellant. *Since, as discussed above, no evidence was furnished by the respondent to show that the money has been withdrawn out of her account, it necessarily follows, as the logic of the law and fairness would dictate, that she is also accountable under the law to make the refund.*

[54] Section 71 of the Contracts Act 1950 would thus in this regard, apply.

…

[60] For the reasons that I have discussed in the foregoing, I find that on the evidence, the appellant had succeeded on a balance of probabilities, in establishing liability on the part of the respondent to require that the respondent refund the sum of RM645,000 credited by the appellant into her account. *Alternatively, a refund of the same under s. 71 of the Contracts Act 1950 has also been established***.** The findings of the sessions court in respect of these key issues however represented an insufficient judicial evaluation of the evidence, as well an erroneous application of the law, which cannot be sustained, justifying appellate intervention. The appellant's other claim of damages for USD25,000 is however dismissed for the absence of evidence. *Accordingly, I reverse the decision of the sessions court in respect of the payment of refund of RM645,000 and allow this appeal, with costs.*

(emphasis added)

Unjust Enrichment

[35] The plaintiff's counsel candidly admitted that unjust enrichment was not pleaded nor relied upon by the plaintiff in the court below. However, the plaintiff maintained that case law suggests that unjust enrichment need not be pleaded so long as the cause of action can be made out from the facts pleaded by the parties. In this regard, the plaintiff has pleaded that:

A (i) the sum of RM350,000 was remitted to the first defendant (paras. 7 to 11 SOC);

(ii) the first defendant has failed to return the said sum (paras. 12 to 15 SOC); and

B (iii) the remittance of the sum of RM350,000 was not for the purchase of the car as alleged by the first defendant (para. 4 of reply to defence).

[36] The plaintiff argued that he ought to be permitted to raise the plea of unjust enrichment against the first defendant at this juncture, citing the case of *Kong Hoi Chieng v. AK Land Sdn Bhd* [2021] 1 LNS 1547; [2021] 6 MLJ C 725 where the Court of Appeal held as follows:

> The plaintiff had not pleaded a claim for restitution by reason of unjust enrichment in the statement of claim against the second defendant
>
> [45] It *is trite that one needs to plead the material facts and not the law or the evidence. Learned counsel for the plaintiff submitted that the pleadings are sufficient* D *for claiming 'unjust enrichment'* against the defendants in respect of the shares in the second defendant and Sabalight Sdn Bhd. *The plaintiff had pleaded that the plaintiff had not received consideration for the shares* as a result of the first defendant's repudiation of the MOU and that the shares were being held by the defendants.
>
> E [46] During the trial, *it was not disputed that the plaintiff had transferred the shares to the defendants pursuant to the MOU.* The plaintiff had transferred 400,000 shares in the second defendant and 250,000 shares in Sabalight Sdn Bhd to the defendants.
>
> [47] We *are also of the view that the defendants did not plead that it had paid* F *for any of the shares in the second defendant.* This was further borne out by the fact that the shares in the second defendant and Sabalight Sdn Bhd were transferred to the first defendant's nominee for a nominal sum of RM1 showed that no payment was made by the defendants.
>
> …
>
> G [49] Since the shares were transferred to the defendants pursuant to the MOU and there was a total failure of consideration for the shares due to the first defendant's repudiation of the MOU, therefore *the defendants had been enriched with the shares in the first defendant and Sabalight Sdn Bhd and the retention of the shares in the first defendant and Sabalight Sdn Bhd is therefore unjust.*
>
> H [50] We note that in the ground of decision of the learned HCJ, it was stated that *the plaintiff did not plead any cause of action for restitution for unjust enrichment against the defendants.* However, before coming to the finding that the plaintiff did not plead any cause of action for restitution for unjust enrichment against the defendants the HCJ had held that:

I

> [50] We are here dealing with a claim based on restitution for unjust enrichment due to the breach of the MOU by the first defendant.
>
> …
>
> [53] We *are of the considered view that the pleadings are sufficient for claiming 'unjust enrichment' against the defendants in respect of the shares in the second defendant and Sabalight Sdn Bhd.* The plaintiff had pleaded that the plaintiff had not received consideration for the shares as a result of the first defendant's repudiation of the MOU and that the shares were being held by the defendants. (emphasis added)

[37] I accept the plaintiff's submission that he ought to also succeed in equity on unjust enrichment. In this context, I would refer to the seminal judgment of the Federal Court in *Dream Property Sdn Bhd v. Atlas Housing Sdn Bhd* [2015] 2 CLJ 453; [2015] 2 MLJ 441, where the leading cases of the House of Lords in *Banque Financiere de la Cite, Appellants v. Parc (Battersea) Ltd* [1999] 1 AC 221 and *Sempra Metals Ltd (formerly Metallgesellschaft Ltd) v. Inland Revenue Commissioners* [2008] 1 AC 561 were discussed, applied and which elucidated the law on this point:

> [109] In Goff & Jones on The Law of Unjust Enrichment, para. 1-08, it is stated:
>
> Whatever may be the underlying moral justifications for the award of restitution all these cases, the 'unjust' element in 'unjust enrichment' is simply a 'generalisation of all the factors which the law recognises as calling for restitution'. In other words, unjust enrichment is not an abstract moral principle to which the courts must refer when deciding cases, it is an organising concept that groups decided authorities on the basis that they share a set of common features, namely that in all of them *the defendant has been enriched by the receipt of a benefit that is gained at the claimant's expense in circumstances that the law deems to be unjust.* The reasons why the courts have held a defendant's enrichment to be unjust vary from one set of cases to another, and in this respect the law of unjust enrichment more closely resembles the law of torts (recognising a variety of reasons why a defendant must compensate a claimant for harm) than it does the law of contract (embodying the single principle that expectations engendered by binding promises must be fulfilled).
>
> [110] *Restitution simply means that a party who has received a benefit must restore the benefit received by him.* The theoretical foundation of the right to restitution remedy as it is understood today is that it is founded on the law of unjust enrichment which fall outside the domains of contract and tort. The law of contract/tort and the law of unjust enrichment are conceptually distinct. Unjust enrichment describes a cause of action. On the other hand, restitution describes a remedy. Restitution as a response to wrongdoing is therefore a different topic from restitution as a response to unjust enrichment (see: Goff & Jones on *The Law of Unjust Enrichment*

A para. 1-04). The courts have found it necessary to make available, independent of the law of contract and civil wrongs, for the restoration of benefits on the grounds of unjust enrichment.

[111] As stated by Lord Wright in *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32 at p. 61:

B

> It is clear that any civilised system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is to prevent a man from retaining the money of or some benefit derive from another which it is against conscience that he should keep. Such remedies in English law are generically different from remedies in contract or in tort, and are now recognised to fall within a third category of the common law which has been called quasi-contract or restitution.

C

[112] Since then English law has recognised an independent law of unjust enrichment by recognising a claim for restitution based on unjust enrichment. According to Goff & Jones on *The Law of Unjust Enrichment* (see para. 1-05), the highest courts have now conclusively recognised that unjust enrichment is a distinct source of rights and obligations in English private law that ranks alongside contract and civil wrongs in importance and accordingly calls for discrete standalone treatment. This was shown in a number of cases which were cited by learned counsel for the defendant, namely *Banque Financiere de la Cite v. Parc (Battersea) Ltd* [1999] 1 AC 221, *R (on the application of Rowe) v. Vale of White Horse District Council* [2003] EWHC 388 (Admin), *Cressman v. Coys of Kensington* [2004] EWCA Civ 47; [2004] 1 WLR 2775, *Chief Constable of Greater Manchester Police v. Wigan Athletic AFC Ltd* [2008] EWCA Civ 1449; [2009] 1 WLR 1580, *Sempra Metals Ltd (formerly Metallgesellschaft Ltd) v. IRC* [2008] 1 AC 561 and *Investment Trust Companies (in Liquidation) v. Revenue and Customs Comrs* [2012] EWHC 458 (Ch D).

D

E

F

…

[117] … the judgments of the House of Lords are instructive and are significant contribution to the development of law of unjust enrichment. *The principle underlying the cases of Banque Financiere de la Cite Appellants v. Parc (Battersea) Ltd.* and *Sempra Metals Ltd (formerly Metallgesellschaft Ltd) v. Inland Revenue Commissioners is that, in the context of the present case, a cause of action in unjust enrichment can give rise to a right to restitution where it can be established that:*

G

(a) *the plaintiff must have been enriched;*

H

(b) *the enrichment must be gained at the Defendant's expense;*

(c) *that the retention of the benefit by the Plaintiff was unjust; and*

(d) *there must be no defence available to extinguish or reduce the Plaintiff's liability to make restitution.*

I

…

[128] The most important question which we must now asked is whether it is unjust for the plaintiff to retain to the benefit (the unjust question). The English approach to the unjust question is to ascertain an unjust factor such as, for example, mistake or failure of consideration. This differs with the civilian approach to the unjust question which consider whether there is a lack of juristic basis. Goff & Jones on *The Law of Unjust Enrichment*, para. 1 -11, explained these two approaches as follows:

Many civilian and mixed law systems have a law of unjustified enrichment, under which a claimant will be entitled to restitution if he can show that a defendant was enriched at his expense and that there was no legal ground for the defendant's enrichment. Under these systems a defendant can escape restitutionary liability by showing that there was a legal ground for his enrichment, for example because the claimant was required to benefit the defendant by statute or by contract. The reason why there is no liability in these circumstances is that the defendant's enrichment is not unjustified and so the claimant has no *prima facie* right to restitution.

The English law of unjust enrichment frequently produces the same results as the law of civilian and mixed law systems, but it works in a different way. Under English law, a claimant will be entitled to restitution if he can show that a defendant was enriched at his expense, and that the circumstances are such that the law regards this enrichment as unjust. For example, a claimant will have *prima facie* right to restitution where he has transferred a benefit to a defendant by mistake, under duress, or on a basis that fails. Nevertheless, the defendant can escape liability if another legal rule entitles him to keep the benefit, and this rule overrides the rule generated by the law of unjust enrichment which entitles the overrides the rule generated by the law of unjust enrichment which entitles the defendant to restitution. For example, a claimant may have paid money to a defendant by mistake, but even so, the payment may be irrecoverable if the claimant was required to pay the money by a statute or by a contract previously entered by the parties. Although the claimant would otherwise have a claim in unjust enrichment, the defendant's enrichment is justified by the statute or contract.

[129] We would adopt 'the absence of basis' (to borrow the term used by Goff & Jones on *The Law of Unjust Enrichment* para. 1-19) approach of the civilian and mixed law systems for the reason that, in our view, it would produce a fairer outcome. *Applying this approach, the plaintiff can escape restitutionary liability by showing that there was a legal ground for receiving an enormously enhanced and improved asset in the form of the business of a shopping mall. The important point to note here is that the defendant was not required to benefit the plaintiff by legislations or by contract. In our judgment the reason why there is liability in these circumstances is that the plaintiff's enrichment is unjustified and that there is no legal ground for the plaintiff to claim and enjoy the full commercial value of the mall. Therefore, the defendant has prima facie right to restitution.*

A

[130] *On the factual matrix of the present case, in our judgment, injustice has occurred to such an extent that the defendant has not only suffered a loss, but the plaintiff is at the same time made richer by the defendant's loss by the same amount. On that note, the point to make here is this. This sense of injustice at the defendant's expense is central to the foundation of the relief of restitution based on the law of unjust enrichment. The plaintiff should not be allowed to reap the windfall at the expense*
B *of the Defendant. The Defendant lawfully constructed the Mall on the Land not intending to do so gratuitously with the Plaintiff enjoying its benefit. On this basis, it warrants judicial intervention as a legal response triggered by an unjust enrichment in the fact situation of the present case.*

[131] *To conclude, we hold that the Defendant had made out a cause of action in*
C *unjust enrichment in that the plaintiff has been enriched, that this enrichment was gained at the defendant's expense, and that the plaintiff's enrichment was unjust.*
(emphasis added)

[38] Following from the analysis of the law at [37] above, the relevant inquiry would be whether all four elements set out by the Federal Court in
D *Dream Property* (*supra*) at [117] have been satisfied. Taking the evidence together, it is apparent to me and I find they are satisfied as follows:

(i) the first defendant has been enriched;

(ii) the first defendant's enrichment has been gained at the plaintiff's
E expense;

(iii) the first defendant's retention of the benefit is unjust; and

(iv) the first defendant has no defence to extinguish or reduce the first defendant's liability to make restitution to the plaintiff.

F **[39]** The plaintiff has not only suffered a loss of RM350,000, but the first defendant has been made richer by the plaintiff's loss by the same amount. This sense of injustice at the plaintiff's expense is central to the foundation of the relief of restitution based on the law of unjust enrichment. Taking into account the circumstances in which the loan was extended to the defendants
G in their hour of need to assist them in their business, allowing the first defendant to retain the benefit of the monies is not consistent with equity or good conscience. She should not be allowed to reap a windfall at the expense of the plaintiff.

[40] I have not overlooked that whilst the plaintiff's pleadings are short on
H relief sought under s. 71 of the Act and on unjust enrichment, these in my respectful view are legal consequences and points of law – which are not mandatory to be pleaded so long as the material facts are pleaded. From a plain reading of O. 18 r. 7(1) of the Rules of Court 2012 ("ROC 2012"), it can be said that a pleading must state the facts and not the law. In fact,
I O. 18 r. 11 ROC 2012 makes it clearer that it is not mandatory to raise a point of law when it employs these words:

A party may by his pleading raise any point of law.

[41] It is pertinent to mention here that in ordinary usage, the word 'may' is permissive and in a statute it will not generally be held to be mandatory – see *Ho Weng Leong v. Ng Kee Chin* [1996] 1 LNS 89; [1996] 5 MLJ 139. In *Quah Swee Khoon v. Sime Darby Bhd* [2001] 1 CLJ 9; [2000] 2 MLJ 600 the Court of Appeal highlighted the fact that material facts may be pleaded without the legal consequences following them. At p. 21 (CLJ); p. 611 (MLJ), the Court of Appeal observed as follows:

> … We would gratefully adopt what was said by Scrutton LJ, in *Lever Bros Ltd v. Bell* [1931] 1 KB 557 at pp. 582 to 583:
>
> > The practice of the courts is to consider and deal with the legal result of pleaded facts, although the particular legal result alleged is not stated in the pleading.

[42] In my view, just as was held by the Federal Court in *Badiaddin* (*supra*) that s. 66 of the Act does not create a cause of action and that it only confers a discretionary remedy in the nature of restitution to be exercised by the court within the ambit of the section and within the principles of the law of contract, so too in my utmost respectful view, a right to obtain restitution under s. 71 of the Act is not a cause of action. It cannot stand on its own. It is dependent upon there being a pre-existing cause of action against the first defendant arising out of a legal or equitable right of the plaintiff for the enforcement of which the first defendant is amenable to the jurisdiction of the court. It was not necessary for the plaintiff to plead that he was seeking a s. 71 remedy.

[43] Not only that. The SOC at prayer 16.5 contains a prayer for 'such further or other relief that this Honourable Court deems fit and just.' "Now these are not empty words" as Salleh Abbas FCJ observed in *Lim Eng Kay v. Jaafar Mohamed Said* [1982] CLJ 298; [1982] CLJ (Rep) 190; [1982] 2 MLJ 156. It is also settled law that this court is entitled to grant relief in equity in the circumstances of this case – see *Sinar Wang Sdn Bhd v. Ng Kee Seng* [2004] 3 CLJ 679 where Gopal Sri Ram, JCA (as His Lordship then was) said:

> … A Court of Equity exercises its jurisdiction not in a straight jacketed or inflexible fashion. The whole approach of equity to problems coming within its parameters is one of flexibility based on broad and general doctrines rather than strict and unyielding rules. This is the hallmark of equity and it is in this fundamental respect that equity differs and diverges from common law. Equitable remedies and doctrines are therefore flexible and adaptable to particular circumstances. The Court of Equity may therefore mould the relief that is to be granted on particular facts.

[44] In my judgment, the formulation in the plaintiff's SOC at para. 16.5 quoted above is sufficient for the exercise of equitable jurisdiction by the court.

[45] Added to that, there is also the case of *Luggage Distributors (M) Sdn Bhd v. Tan Hor Teng & Anor* [1995] 3 CLJ 520; [1995] 1 MLJ 719 CA, wherein Gopal Sri Ram JCA (as he was then) in delivering the Court of Appeal's judgment held that the categories of cases in which an appellate court will admit a new point are not closed. It is my view that it will be in the interest of justice in this case to permit this point of unjust enrichment to be raised for the first time during the appeal. I am fortified in my view as this case involved the undisputed fact that the monies were banked into the first defendant's account and for this, I looked to the Federal Court for guidance in the case of *Morello Sdn Bhd v. Jaques (International) Sdn Bhd* [1995] 2 CLJ 23; [1995] 1 MLJ 577 wherein Edgar Joseph Jr, FCJ (as he was then) in delivering the majority judgment of the Federal Court held:

> Be that as it may, *it is clear law that an appellate court is more likely to entertain a new point if it relates to a matter which had been before the court of trial, for example, a new argument based '… upon the construction of a document or upon facts either admitted or proved beyond controversy'*. (See *Connecticut Fire Insurance Co v. Kavanag*h [1892] AC 473 at p 480. Similarly, see *Donaghey v. O'Brien & Co* [1966] 2 All ER 822 at pp. 828, 831; [1966] 1 WLR 1170 at pp. 1180, 1183). (emphasis added)

[46] Having considered the cause papers and the parties' submissions, I am of the respectful view that the LSCJ ought to have concluded on the evidence, as well as the legal result arising from the JID against the second defendant that, the plaintiff has proven his case on a balance of probabilities and entitled to restitution of his monies. Any other finding will do violence and offend the banal and fundamental equitable principles of good conscience. With due respect to the LSCJ, there is insufficient judicial evaluation of the facts and law. The issue of the legal ramifications of the JID against the second defendant was completely overlooked and warrants appellate intervention. The remedy of restitution under s. 71 of the Act do not depend on privity of contract. The judicial finding in the court below cannot be defended, considering the facts, the evidence and the applicable law.

[47] Central to appellate intervention, is that a decision arrived at by a trial court without judicial appreciation of the evidence might be set aside on appeal. This is consistent with the "plainly wrong" test – *Gan Yook Chin & Anor v. Lee Ing Chin & Ors* [2004] 4 CLJ 309; [2005] 2 MLJ 1 FC. In this regard, I have also borne in mind the most recent Federal Court pronouncement on the subject in *Ng Hoo Kui & Anor v. Wendy Tan Lee Peng, Administrator For The Estates Of Tan Ewe Kwang, Deceased & Ors* [2020] 10 CLJ 1; [2020] 12 MLJ 67; [2020] 1 LNS 1060 para. 148 per Zabariah Mohd Yusof FCJ that so long as the trial judge's conclusion can be supported on a rational basis in view of the material evidence, the fact that the appellate court feels like it might have decided differently is irrelevant. In other words,

a finding of fact that would not be repugnant to common sense ought not to be disturbed. The trial judge should be accorded a margin of appreciation when his treatment of the evidence is examined by the appellate courts.

[48] Whilst I appreciate that the LSCJ heard the parties' evidence at trial, and she had to wrestle with the minutiae of that evidence, and this court as such, should be slow to overturn primary findings of fact made by her, I am however satisfied that had the LSCJ correctly directed herself on the facts and the relevant law, I have no reasonable doubt that she would have held that the plaintiff is entitled to judgment against the first defendant. The evidence incontrovertibly indicated that the first defendant here has a benefit for which she knows that she has not bargained or paid. It is immediately obvious that, a failure to do the honourable thing and return the benefit can be unconscionable to invoke equity's conscience. The equitable jurisdiction of this court exists to assist the court in achieving the ends of justice in appropriate cases. In my judgment, justice requires restitution be made by the first defendant to the plaintiff.

[49] For the reasons given, I find there are merits in this appeal.

[50] As such, the appeal is allowed with costs; judgment for the plaintiff against the first defendant for the sum of RM350,000 with interest at 5% per annum from date of filing of the claim *ie*, 18 December 2019 until full settlement; the order of the LSCJ dated 31 December 2021 is set aside; the first defendant is to pay to the plaintiff costs here and below in the sum of RM25,000 subject to allocator.

[51] I have not dealt with every single argument advanced and case authority relied upon by the parties as I found it unnecessary to do so in arriving at a decision.